IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISCELLANEOUS APPLICATION NO. 377 OF 2006

Mr. Joaquim Borges,
Son of Mr. Albert Borges,
Age about 70 years,
Resident of Povacao,
Nuvem, Salcete, Goa. ... Applicant

versus

1. Mr. Joao Manuel Silva,
   Son of Mr. Simao Silva,
   Age about 54 years,
   Resident of 4th Ward,
   Colva, Salcete, Goa.

2. State of Goa,
   Through its Public Prosecutor,
   Panjim, Goa. ... Respondents

Mr. Jose Filipe Melo, Advocate for the Applicant/Complainant.

CORAM : N. A. BRITTO, J.

DATE : 22ND NOVEMBER, 2006.

ORAL ORDER

Heard Mr. J. F. Melo, the learned Counsel on behalf of the applicant/complainant. The complainant has sought leave

to appeal against the acquittal of the accused under Section 138 of the Negotiable Instruments Act, 1881(Act, for short). There is no dispute that as stated by the complainant the complainant had advanced a sum of Rs.4,00,000/- on 20-9-2000 to the accused which the accused had agreed to pay with 10% interest. The said loan was advanced against a Demand Promissory Note. The accused issued four cheques in the sum of Rs.50,000/- each on 4-11-2004 which came to be dishonoured and upon the service of statutory notice, the complainant filed the complaint and the accused came to be acquitted under Section 138 of the Act vide Judgment dated 30-8-2006. The acquittal of the accused is based on a Judgment of this Court in the case of **Narendra V. Kanekar** v. **Bardez Taluka Co-operative Housing Mortgage Society Ltd. and others**(2006(2) Goa L.R. 13). The learned trial Court has held that the said four cheques were issued after the expiry of three years from the date the loan was given and they had ceased to be a management under Section 18 of the Indian Limitation Act, 1963 and as there was no other document after 20-9-2003, the said cheques could not be considered to have been a promise in writing to pay the debt. It is contended on behalf of the complainant that the subject cheques in themselves

have to be considered a promise to pay a time barred debt under Section 25(3) of the Act. This issue is covered by the aforesaid Judgment of this Court referred to hereinabove wherein it is stated that mere giving of a cheque will not revive a barred debt. In fact, this Court has stated thus:-

> "Mere giving a cheque, without anything more, will not revive a barred debt, because cheque has to be given, as contemplated by the explanatory in discharge of a legally enforceable debt. There is no doubt that in terms of the Indian Limitation Act, 1963, a signed acknowledgement of liability made in writing before the expiration of the period of limitation, is enough to start a fresh period of limitation. Likewise, when a debt has become barred by limitation, there is also Section 25(3) of the Contract Act, by which, a written promise to pay, furnishes a fresh cause of action. In other words, what clause (3) of Section 25 of the Indian Contract Act in substance does is not to revive a dead right, for the right is never dead at any time, but to resuscitate the remedy to enforce payment by suit, and if the payment could be enforced by a suit, it means that it still

has the character of legally enforceable debt as contemplated by the explanation below Section 138 of the Act. As far as this aspect of the case is concerned, the learned Division Bench observed that to determine as to whether or not a liability is legally enforceable, the provisions of the Contract Act cannot be said to be irrelevant. This can provide a cause for a legal liability. Although the primary question answered by the Division Bench was that a cheque becomes a promise to pay under Section 25(3) of the Contract Act, this view need not be followed by this Court in the light of the judgment of this Court in the case of Ashwini Satish Bhat v. Shrijeevan Divakar Lolienkar(supra) and the other two judgments referred to hereinabove. Nevertheless, the Division Bench judgment is relevant to the extent that it holds that a promise to pay in writing as per Section 25(3) of the Indian Contract Act, 1872, matures into an enforceable contract, which can be enforced by filing a civil suit. If a suit could be filed pursuant to a promise made in writing and signed by the person to be charged therewith, as contemplated by clause (3) of Section 25 of the Law of Contract, then, in my view, the debt becomes legally

> enforceable and if a cheque is given in payment of such debt is dishonoured and subsequently, the statutory notice is not complied with, then the person making the promise in writing and issuing the cheque, would still be liable to be punished under Section 138 of the Act".

2. In view of the above, the Judgment of the learned trial Court could not be faulted. Application for special leave therefore is hereby dismissed in limine.

N. A. BRITTO, J.

RD